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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 151.

NATIONAL CARBIDE CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 152.

AIR REDUCTION SALES COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 153.

PURE CARBONIC, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR THE PETITIONERS.

I.

The Government states (Br. 14) that this Court's decision in *Moline Properties, Inc. v. Commissioner*, 319 U. S. 436, "demonstrates (pp. 440-441) that *unless the corporation is truly acting as an agent with respect to the stockholder's property*, the type of agency argument which the taxpayers here ad-

vance can not avail to make the stockholder the taxable owner of the corporation's income." (Italics ours.) Thus, the effectiveness of an agency relationship is expressly conceded.

Then, and despite the clear finding of the Tax Court, the Government repeatedly asserts that the subsidiaries were not agents. Thus (Br. 8), the Government says that: ". . . there is nothing in the record to substantiate this claim" with respect to agency. Again, on p. 9 of its brief, the Government says: "Consequently, no principal-agent relationship was created . . ."; and "Absent a true principal and agent relationship . . .". Finally, it says (Br. 16) that ". . . there is nothing in the record to support the conclusion that there was a principal-agent relationship which would suffice to make the parent the taxable owner of the income."

These statements completely disregard the record which is, in fact, full of evidence establishing the principal-agent relationship. A primary objective of the petitioners' proof through the four-day trial in the Tax Court was to show the existence of such relationship. That evidence need not be reviewed by this Court. It is fully reflected in the findings of the Tax Court, which is charged with the determination of fact matters in tax cases.

On the basis of all the evidence the Tax Court found (R. A., 28):

> "Petitioners were the corporate agents of Airco and were operated as incorporated branches or divisions of Airco. The income from the operations of petitioners which is in excess of six per

> rent. of petitioners' outstanding capital stock belonged to and was the income and property of Airco as principal."

Moreover, the Circuit Court of Appeals did not disagree with this finding nor did it decide that there is no evidence in the record to support it. On the contrary, in its recent decision in *Railway Express Agency, Inc.* v. *Commissioner*, 168 F. 2d. ——, decided July 19, 1948, after the present petition was filed, the court below, referring to the present case, specifically pointed out:

> "So, too, it should be noted that there the subsidiaries were employed by the parent company *as its agents.*" (Italics ours.)

Thus, the Tax Court and the Circuit Court of Appeals are agreed that this is a true case of agency. The Government's effort to ignore the evidence and the findings, all of which are fully supported by the record, shows the weakness of its position.

The Government seeks subtly to convey that this case involves an attempt improperly to evade taxes. Thus, it refers to an " 'agency' device" (Br. 5), "self-styled agents" (Br. 9), and to a "contractual device" (Br. 10). This is wholly unwarranted.

The agency contracts were not some clever documentary scheme for purposes of tax evasion. As the record thoroughly establishes, they originated in reasons of practical business policy and were: of many years standing; always consistently adhered to; and always fully disclosed to the Government and to the Commissioner. Moreover, that they were justifiable

and reasonable appears from these facts, among others, that Airco furnished to the subsidiaries all assets, working capital, and all other instrumentalities used in the production of income.

Indeed, this form of corporate organization had no tendency to save taxes. It would not have resulted in any claim of tax liability here except for the fortuitous operation of the so-called declared value excess profits tax. See pp. 6-7 of the Petition.

II.

The Government points out at length that the actual facts in *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, were not the same as those in the present case. But, no cases have identical facts.

The important point is that the full bench of the Tax Court regarded *Southern Pacific Co.* v. *Lowe* as establishing a principle which is applicable and controlling in this case, and that the court below reached a diametrically opposed conclusion as to the controlling validity of that case.

In its brief, the Government says (Br. 11):

> "The issue in the present case is whether a subsidiary, *regardless of the affinity between it and its parent corporation*, can escape being taxed on the income which it earns." (Italics ours.)

This amounts to an assertion that so far as tax consequences are concerned, the relationship of principal and agent can never effectively exist between a

parent and subsidiary corporation. This position is not merely contrary to the Government's own concession (Br. 14), to which reference has already been made, *supra*, pp. 1-2, but is in the teeth of the decision in *Southern Pacific Co.* v. *Lowe*. In that case this Court held that the subsidiary acted as "agent" of the parent (*Peabody* v. *Eisner*, 247 U. S. 347, 349), and gave effect to that decision. The agency relationship established here should likewise be given effect.

III.

The Government makes no reference to the public importance of a decision in this case, although every corporate taxpayer with subsidiaries must necessarily be in confusion until this Court speaks.

The full bench of the Tax Court has taken one position on an important question with respect to a decision of this Court. A Circuit Court of Appeals has taken a contrary position. But, in the absence of a decision of this Court, there is no reason why the Tax Court should not continue to follow its own view, and presumably it will do so.

Lack of finality of this sort has plagued the tax field since the creation of the Board of Tax Appeals. The problem is to find some rational and effective way for minimizing such confusion and establishing a rule so that taxpayers may know what is expected of them, and government representatives may know their duty. The obvious and natural solution is for this Court to review a decision where a Circuit Court of Appeals is in direct conflict with the full bench of the Tax Court, and the conflict involves a clear disagreement

with respect to the application of a leading decision of this Court.

The petitioners respectfully pray that writs of certiorari be granted.

Respectfully submitted,

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